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In The Supreme Court Of The United States

October Term, 1987

LAURA REAGIN,

Petitioner

v.

CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a/ Mt. Hope Shell Service Station; MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

I. RESPONDENTS INCORRECTLY ARGUE THAT THE STATE STANDARD OF EVIDENTIARY SUFFICIENCY IS THE SAME AS THE FEDERAL STANDARD AS APPLIED HERE.

Respondents concede that a conflict in the circuits exists as to whether state or federal law governs the decision as to the sufficiency of the evidence to support a jury verdict in diversity cases. Brief for Respondents in Opposition, p. 18 (hereinafter Respondents' Brief). Respondents' only argument in opposition to this as a ground for the grant of certiorari is their contention that the result would be the same whether federal or North Carolina law is applied. Assuming, as respondents contend, that the Court below properly applied the federal standard, respondents are manifestly incorrect that North Carolina law would mandate the same result.

Respondents quote from a recent decision by the North Carolina Court of Appeals, an intermediate court, which, say respondents, uses the federal standard in defining proximate cause. White v. Hunsinger, 363 S.E.2d 203 (N.C.App. 1988).

Respondents are apparently impressed by the use of the word "probable"[1] in Hunsinger in contrast to what Hunsinger called a "remote possibility." But respondents fail to recognize that in North Carolina unless there is no evidence from which an inference of proximate cause can be

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[1]The Court of Appeals held the jury's finding on proximate cause not "reasonably probable," (A 55), a phrase frequently used in the circuit courts of appeal. But cf., Galloway v. United States, 319 U.S. 372, 87 L.Ed. 1458, 63 S.Ct. 1077 (1942), discussed infra, p. 17, where this Court specifically disapproved the wholesale framing of standards even under federal law and said the inferences to support a verdict must only be "reasonably possible" if there are probative facts in support.

drawn, the question of what inference is probable or possible or permissible under any general standard must be left to the jury. See Millikan v. Guilford Mills, Inc., 70 N.C.App. 705, 320 S.E.2d 909 (1984) disc. rev. den. 312 N.C. 798, 325 S.E.2d 631 (1985) ("close cases, dubious cases, questionable cases, and even weak cases are still for the jury" on proximate cause). This is made imminently clear by the language from Hunsinger that plaintiff lost because he had not provided any evidence showing that plaintiff would not have died had he been referred earlier to a neurosurgeon.

Note that in Hunsinger the Court of Appeals limited its discussion to malpractice cases. Since plaintiff's case in Hunsinger depended entirely upon expert testimony it necessarily

failed because the expert testimony was insufficient. Every case relied on by respondents on the question of evidentiary sufficiency was involved with whether or not the expert testimony offered was sufficient. See Respondents' Brief, p. 22.

By contrast, although petitioner here offered what amounted to expert testimony on appropriate standards of care, this case did not require expert testimony, either on the standard of care or on proximate causation, and neither court below held that it did. The jurors were perfectly capable, in the use of their common judgment and experience, to decide whether the conduct of the respondents was reasonable and whether it caused injury. In this situation the North Carolina Supreme Court has emphasized again and again the

following from Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687, 690 (1963):

> When more than one legitimate inference can be drawn from the evidence, the question of proximate cause is to be determined by the jury. ... "It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case." (Emphasis supplied.) Conley v. Pearce-Young-Angel Co., 224 N.C. 211, 29 S.E.2d 740.

A 1987 North Carolina Supreme Court case makes clear that the law of North Carolina would have afforded this petitioner the recovery she earned before the jury. In Taylor v. Walker, 320 N.C. 729, 360 S.E.2d 796 (1987), the plaintiff was injured by a shot as he left a rowdy bar--the shot came from the bar--following an altercation in which he struck the first blow, and where he had remained for some time

after it was obvious that trouble was brewing. Both the trial court and the intermediate appellate court had granted JNOV for defendant on grounds that plaintiff was contributorily negligent in remaining in the bar and striking a patron, but North Carolina's highest court reversed, stating:

> The issue, after all, is not whether Taylor chose the best or wisest alternative in remaining in the bar that night and in eventually becoming involved in the altercation with the drunken and belligerent Bear Suits. He most certainly did not. The true issue is whether there is evidence that, if believed, would support an inference that he acted reasonably under admittedly difficult circumstances. We think there is and we so hold. 360 S.E.2d at 800. (Emphasis supplied.)

As to proximate cause, the Supreme Court said:

> As to proximate cause, there was no direct evidence whatsoever that the shot which struck plaintiff was fired by either Bear Suits or any of his friends. Any such

> conclusion is mere speculation. These issues, and their resolution, were better left to the jury, and the trial court therefore erred in allowing defendants' motion for judgment notwithstanding the verdict. 360 S.E.2d at 800.

The rationale for its decision in Taylor v. Walker was stated by the North Carolina Supreme Court as follows:

> Ordinarily, such a judgment [JNOV] is not proper unless it appears as a matter of law that a recovery simply cannot be had by plaintiff upon any view of the facts which the evidence reasonably tends to establish. ...
>
> The heavy burden carried by the movant is particularly significant in cases, such as the one before us, in which the principal issues are negligence and contributory negligence. Only in exceptional cases is it proper to enter a directed verdict or a judgment notwithstanding the verdict against a plaintiff in a negligence case. ... Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the prudent

> man test, or any other applicable standard of care, is generally for the jury. (Citations omitted.) 360 S.E.2d at 799.

The negligence of respondents here in failing to maintain safe premises--which negligence was conceded expressly or by implication by both courts below--cannot rationally be said to promote only one inference as to causation when: (a) the station, in an isolated location, was staffed by only one partially paralyzed attendant, who kept $500 to $600 unprotected on the premises; (b) the rapist used a pistol carried by the station attendant negligently and in violation of North Carolina law to accomplish the rape; (c) the rapist made no move to commit any crime and hid in the restroom while a second person was on the premises; (d) the rapist violated petitioner in an area of the station which, if the

attendant himself is to be believed, was so dark that he could not tell whether petitioner was male or female from 75 to 100 feet away; (e) the station attendant allowed the rapist to loiter on the premises for upwards of an hour before the attack; (f) the station attendant--while drinking coffee--allowed the rapist to get behind him and take from him the pistol which he used in the rape of the petitioner; (g) respondents led petitioner into the trap in the first place by negligently blocking their windows so that she could not see what was going on as she approached the station or after she exited the restroom; and (h) after the rape began the station attendant did nothing to call for help even though a safe telephone was close by in another service station.

Space does not permit us to comment on the inaccuracy of the version of the facts as stated by Respondents' Brief. There is no necessity to do so, for even under respondents' version petitioner was entitled to recover under North Carolina law. The fact petitioner was injured by a criminal act is irrelevant, as respondents ought to concede, because if the criminal act was foreseeable, respondents had a duty to guard against it. Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, 68 S.Ct. 140 (1947); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 201 S.E.2d 36, 40 (1981). Foreseeability here is conceded by both lower courts.[2]

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[2]To hold, as the District Court did, that because the rapist, who did not testify by deposition or appear at trial, had a criminal record no reasonable security measures would have deterred or prevented the attack is

All courts agree that on a motion for JNOV the facts must be viewed in the light most favorable to the plaintiff. In Millikan v. Guilford Mills, Inc., 70 N.C.App. 705, 320 S.E.2d 909 (1984), disc. rev. den. 312 N.C. 798, 325 S.E.2d 631 (1985), the North Carolina Court of Appeals said:

> Rarely is it proper to direct a verdict against a plaintiff in a negligence case. ... This is because of the favorable view that must be taken of the plaintiff's evidence in such cases, the prerogative that juries have in all cases to believe all, none, or some of the evidence presented to them, and what is reasonably prudent conduct under varying circumstances is nearly always a question of fact, rather than law. Thus, to survive a motion for directed verdict in such a case, the plaintiff's evidence tending to show a defendant's negligence does not have to be either strong, convincing, consistent, or even credible to anyone except the jury; it is enough if the evidence favorable to plaintiff, when pieced

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such an obvious invasion of the jury's province as to need no discussion.

> together, is sufficient, along with the inferences reasonably drawable therefrom, to warrant finding that plaintiff was injured as a proximate result of the defendant's negligence. Thus, under our law, close cases, dubious cases, questionable cases, and even weak cases are still cases for the jury.... (Emphasis supplied.)

Manifestly, petitioner would not have been denied her recovery under North Carolina law. Undoubtedly both the District Court and the Court of Appeals recognized this, as each was careful to state that the case was being decided under federal law. The record in this case presents a classic conflict between federal law, as applied below, and state law and provides this Court a much needed opportunity to resolve the conflict in the circuits as to which law applies, and to decide the question specifically left open in Dick v. New York Life Ins.

Co., 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959).

II. RESPONDENTS ARE INCORRECT IN STATING THAT THERE IS NO CONFLICT IN THE FEDERAL COURTS AS TO WHEN THE EVIDENCE IS SUFFICIENT TO SUPPORT A JURY VERDICT.

Respondents contend that no conflict exists in the circuits which would be determinative of the outcome in this case. Respondents' Brief, p. 14. Not only does a conflict exist in the circuits which would be determinative--a conflict exists with decisions of this Court which would be determinative. As discussed in petitioner's opening brief on Petition for Certiorari, pp. 45-53, many cases in this Court would mandate a different result here. In fact, North Carolina law and federal law as declared in Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916

(1947), are the same. The Lavender Court said:

> Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.

This case, applying federal standards, can stand scrutiny only if Lavender, Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, 68 S.Ct. 140 (1947), and other FELA cases do not apply, a question this Court has never decided. See also the other non-FELA cases cited in Petitioner's opening brief on Petition for Certiorari, pp. 45-53, as well as Galloway v. United States, discussed infra.

And in diversity cases involving similar fact situations to the one at bar other highly respected courts of appeal have differed sharply with the courts below. Some of these cases are cited at page 52 of Petitioner's

opening brief on Petition for Certiorari and need not be repeated here. There can be no doubt that those cases, Doyle (2d Circuit), Kenny (3d Circuit), and Boles (5th Circuit), are highly inconsistent both in reasoning and result with this case, making this case clearly certworthy on the circuit conflict alone. Compare also the excellent discussion in Banks v. Hyatt Corp., 722 F.2d 214, reh. den. 731 F.2d 888 (5th Cir. 1984) (JNOV reversed where patron shot by criminal outside of hotel).

The sole citation by the Court of Appeals in support of its finding as to the lack of proximate cause was to an age discrimination case involving the question whether an employee had been discharged because of his age. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982),

where the Fourth Circuit discussed at length its "reasonable probability" or "substantial probability" standard. Clearly, an age discrimination case presents different questions of proof than does a negligence case, as the North Carolina courts have expressly recognized. Please see the quoted language from Taylor v. Walker, supra, and Millikan v. Guilford Mills, supra. Also it is significant that none of the cases cited by Respondents' Brief, p. 20, for the appropriate federal standard were negligence cases involving a jury's application of the prudent man standard. The Fitzgerald case cited by respondents was a medical malpractice case, the Owens, Ralston Purina and Ford Motor Co. cases were product liability cases involving expert testimony, and the Lovelace case, as indicated, was an Age

Discrimination in Employment Act case, the sole case relied on by the Court of Appeals.

This Court has recognized that the standards for adequacy of evidence to go to a jury may vary from case to case. In Galloway v. United States, 319 U.S. 372, 87 L.Ed. 1458, 63 S.Ct. 1077 (1942), noteworthy also because it was a ruling by this Court in a non-FELA setting, this Court recognized that no one standard may be formulated for all types of cases. The Court said:

> Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon "substantial evidence" rather

> than "some evidence" or "any evidence," or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence or on motion for a directed verdict, cannot amount to a departure from "the rules of the common law" which the Amendment requires to be followed. If there is abuse in this respect, the obvious remedy is by correction on appellate review. (Emphasis supplied.) 319 U.S. at 395, 87 L.Ed. at 1473, 63 S.Ct. 1099.

III. CONCLUSION

Over 60,000 diversity cases are filed each year. There is no doubt that the circuits are confused and divided over whether state or federal law as to evidentiary sufficiency

applies. The courts below explicitly deemed themselves to be applying federal law and reached a result contrary to the law of North Carolina. This case presents this Court an opportunity to clarify the law, bring consistency to the lower court rulings, and avoid the forum shopping which Erie R.R. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938) sought to avoid.

If this Court should decide that federal law applies, this case presents an opportunity for the Court to clarify the relationship between its decisions in FELA cases and in diversity cases, to resolve the inconsistency between this case and the cases decided in the Second, Third, Fifth and other circuits, and to rule on the practice by the courts below in purportedly applying the same standard to all types

of cases. In so doing, the Court will decide Seventh Amendment questions of far-reaching significance.

Respectfully submitted,

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I, Barbara E. Grove, being first duly sworn, deposes and says: On February 10, 1988, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing Petitioner's Reply to Brief for the Respondents in Opposition via Federal Express and further certify that on February 9, 1988 I mailed the required three copies via first-class mail to the opposing counsel listed below:

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TO WIT:

This day personally appeared before me, a notary public in and for the aforesaid jurisdiction, Barbara E. Grove, who made oath that the statements contained herein are true and accurate to the best of her information, knowledge and belief.

Given under my hand this 9th day of February, 1988

My Commission expires: June 9, 1991.

Notary